Judge Leff, as a prerequisite to deciding the motions held that the record indicated that as a matter of state law, there was not a binding settlement made between the parties. Thus finding, he rejected the various applications of the Unger interests and directed that the reference previously begun go forward to take testimony on the issues of the exact amount of money actually owed Isaias on the defaulted mortgage.

Petitioners herein subsequently directly appealed each of those findings as well as the order of Judge Leff which directed that reference continue. The order appealed from was affirmed. Among other things it was not from a final judgment. Petitioners are presently in the process of appealing in the Appellate Division from Judge Leff's final judgment based on the report of reference. It is scheduled to be argued on May 11.

Reasons for Denying Certiorari

There is no indication whatever that petitioners cannot receive a fair review in the New York State appellate courts now that there is a final judgment. Indeed, such a complete review from the entire final judgment is scheduled to be heard on May 11. Moreover the availability of an appeal from final judgment is the settled basis for denying prohibition (N. Y. Civil Practice Law and Rules, Section 7801, subd. 1. *Lawrence* v. *Supreme Court*, 24 AD 2d 849, 264 N.Y.S. 2d 501 (1965). See: *Duncan* v. *Tennessee*, —— U.S. ——, 40 L.W. 4206, Feb. 23, 1972. Further too, petitioners' plenary suit, on an amended complaint in the Federal courts, seeking to enforce the alleged settlement on information and belief, is *sub judice*.

On the merits, it is well to note that Judge Leff apparently made a correct decision according to state law in his ruling that there was not a settlement. That this must be so is indicated by the fact that the Appellate Division re-

fused to amend its remittitur. The later denial of petitioners' appeal to it from respondent's directions and findings also indicated that Judge Leff was correct as a matter of state law, although the Appellate Division could have denied merely because it was untimely. (See order of Appellate Division dated March 29, 1972—Isaias Appendix p. 17.)

In any event, with respect to petitioners' motion for prohibition; that was a remedy which petitioners were not only not entitled to have as a substitute for appeal but one which they did not deserve on the merits.

There is no doubt that after reading the motion papers in the proceedings below, and after reading the entire record, Judge Leff formed an unfavorable opinion of one of the litigants, the appellant Ungar. But this is not a bias which prevented a fair decision. See *Unger* v. *Sarafite*, 376 U.S. 575; N. Y. Judiciary Law, Section 15; *Matter of Rotwein (Goodman)*, 291 N.Y. 116, 123 (1943).

Moreover, it must be noted that the very fact that Judge Leff ordered the reference by Hon. Frank J. McNabb to proceed as originally ordered by Justice Fine, to hear and report as to exact amount of money owed by petitioner to Isaias in an *undeniably* defaulted mortgage belies the claim of appellant of any pervading bias. Judge Leff did not withdraw the case from the referee for trial by himself but instead ordered the matter continued before the same referee appointed by a judge whose disinterestedness petitioner has never questioned. Indeed, the recommendations made by this referee have been followed by respondent, Judge Leff.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York, May 3, 1972.

Respectfully submitted,

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